No. 98-404

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
APPELLANTS

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

The Constitution provides that Representatives shall be apportioned among the States "according to their respective Numbers." U.S. Const. Art. I, § 2, Cl. 3; U.S. Const. Amend. XIV, § 2. To effectuate that constitutional command, the Census Clause directs that an "actual Enumeration" of the population must be made at least once within every ten-year period. U.S. Const. Art. I, § 2, Cl. 3. That Clause states that the enumeration may be conducted "in such Manner as [Congress] shall by Law direct," *ibid.*–-language that "vests Congress with virtually unlimited discretion," *Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996). Congress in turn "has delegated its broad authority over the census to the Secretary" of Commerce, *ibid.*, by directing the Secretary to "take a decennial census of population * * * in such form and content as he may determine," 13 U.S.C. 141(a).

Based on abundant scientific evidence and the opinions of numerous experts and panels, the Census Bureau has determined that the use of statistical sampling mechanisms in the 2000 census will improve the accuracy of the state-level population counts that will be used in apportioning Representatives among the States. The House of Representatives does not contest that determination. The House nevertheless contends that the use of sampling for apportionment purposes is barred by both the Constitution and the Census Act, despite the sweeping grants of authority described above, and despite the fact that the Act specifically authorizes the use of "sampling procedures" in the conduct of the decennial census. The House's claims should be rejected, both because the House lacks any judicially cognizable interest in the issue, and because the Bureau's plan for the 2000 census falls well within its lawful sphere of discretion.

A. The House of Representatives Lacks Standing To Bring This Suit

1. Contrary to the House of Representatives' contention (Br. 12-18), the Commerce Department's plan for the 2000 census imposes no actual or imminent "informational injury" upon the House. The House does not seek to compel the production of information already in the possession of the Executive Branch defendants. Compare *McGrain* v. *Daugherty*, 273 U.S. 135 (1927). Nor does it seek to compel them to procure information currently in the possession of a private party. Compare *FEC* v. *Akins*, 118 S. Ct. 1777 (1998). Rather, the purpose of the instant suit is to effect a fundamental alteration in the methodology by which the Commerce Department plans to conduct the 2000 census. The fact that one consequence of the district court's order would be the furnishing of different population figures to Congress is not a sufficient basis for concluding that the House has a judicially cognizable "informational" interest in the case.[1]

The House of Representatives contends (Br. 14-16) that it must receive state-level population totals derived without the use of sampling in order to decide intelligently whether the current statutory apportionment formula (the method of equal proportions, see 2 U.S.C. 2a(a); *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455 (1992)) should be changed. That asserted basis for standing is farfetched.

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[1] The relief requested by the House and awarded by the district court goes well beyond an order directing the Commerce Department to provide Congress with state-level population figures derived without the use of sampling. Rather, the effect of the court's order is to require that figures produced without the use of sampling must be certified by the President as the *official* state-level totals pursuant to 2 U.S.C. 2a(a). As we explain in our opening brief (at 21 & n.10), the evident purpose of such relief is to achieve the current House's policy objectives *without* the passage of any new law—not to facilitate future legislative activity.

Although Congress undoubtedly retains authority to enact a new law adopting a different apportionment formula, see *Montana*, 503 U.S. at 463-465, the House offers no basis for believing that such legislative action is likely to occur in the foreseeable future. Nor is there any reason to suppose that a particular set of state-level population figures for the year 2000 would be necessary or even useful to any principled legislative reconsideration of the equal proportions formula. Indeed, the premise of the House's argument–-*i.e.*, that it can intelligently choose among possible apportionment formulas only if it knows the effect of each formula on the 2001 apportionment of Representatives among the States–-is inconsistent with the House's purported determination to prevent political manipulation of the census.[2]

2. Relying on *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972), the House of Representatives argues (Br. 18-21) that it possesses a judicially cognizable

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[2] As the House points out (Br. 14), Congress's practice for much of the country's history was to enact a new apportionment law after each decennial census. Congress abandoned that practice in 1941, however, by adopting a permanent, self-executing apportionment formula and thereby obviating the need for the frequently acrimonious disputes that had previously characterized the apportionment process. See Comm. Dep't Br. 3 n.1. Although the Constitution does not preclude Congress from resuming its earlier practice, the House has not pointed to any meaningful likelihood that Congress will choose to do so.

The House also suggests (Br. 13 & n.13) that it might use population figures derived without the use of sampling in order to determine the qualifications of potential Members elected after the 2001 apportionment. The existing reapportionment statute, however, unambiguously provides that "[e]ach State shall be entitled * * * to the number of Representatives shown in the statement" transmitted by the President to Congress. 2 U.S.C. 2a(b) (Supp. II 1996). The House identifies no authority suggesting it could refuse to seat Members elected in accordance with the apportionment mandated by law. The precedents cited by the House (see Br. 13 n.13) involved situations in which a State was found to have elected Representatives in excess of the number allotted by *statute*.

interest in its "lawful composition." The House's reliance on *Beens* is misplaced. The district court judgment under review in that case would have fundamentally altered an existing legislative body by, *inter alia*, requiring that the number of senatorial districts within the State be reduced from 67 to 35. See 406 U.S. at 188-193. By contrast, the Census Bureau's plan for the 2000 census can have no effect whatever upon the House of Representatives until the 108th Congress convenes in the year 2002. See Comm. Dep't Br. 24-25 n.12. Even at that time, the House will be composed of 435 Members regardless of whether sampling is employed in the 2000 census. Although the use of sampling might affect the number of Members chosen from several States, and thus the identities of some individual Members of the House, any such effects would have no impact on the vast majority of States and Members and would impose no injury on the House as a corporate body.[3] There is, moreover, no reason

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[3] The apparent premise of the House's argument is that any violation of law affecting the identity of a single Member causes the House to be unlawfully composed. In a variety of circumstances, however, the manner in which individual Representatives are seated (or unseated) has been found to have been tainted by constitutional error. See, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952 (1996) (manner in which State considered racial factors in drawing congressional districts violated the Equal Protection Clause); *Karcher* v. *Daggett*, 462 U.S. 725 (1983) (State violated Article I, Section 2 by failing to draw congressional districts that were as nearly equal in population as practicable); *Powell* v. *McCormack*, 395 U.S. 486 (1969) (House of Representatives violated Article I, Section 5 by refusing to seat an elected Representative who possessed the constitutional qualifications). It seems to us a very dubious proposition–-and one that scarcely serves the continuing interests of the House–-to suggest that such infirmities in the selection of individual Members cast doubt on the "constitutional character" (House Br. 19) of the entire House of Representatives.

Although the House asserts (Br. 27) that "the Secretary's decisions [regarding statistical sampling] could have an enormous impact on the apportionment of Representatives in Congress," the statistical adjustment

to assume that the House of Representatives for the 108th Congress—a body that will be composed of individuals who have won election based on the 2001 apportionment—will regard itself as being unlawfully composed.[4]

3. In our opening brief, we explain (at 24) that intra-governmental disputes concerning the respective prerogatives of the political Branches have traditionally been regarded as insusceptible of judicial resolution. The precedents cited by the House of Representatives (see Br. 23-24 & nn. 28-29) do not refute that proposition. Those cases involved either (a) disputes between a governmental entity and a government official litigating in his individual capacity, see, *e.g.*, *United States* v. *Will*, 449 U.S. 200 (1980), or (b) disputes whose resolution would have concrete effects on a private actor who was a party to the case, see, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 939-940 (1983). As *Chadha* and subsequent decisions (see, *e.g.*, *Morrison* v. *Olson*, 487 U.S. 654 (1988); *Bowsher* v. *Synar*, 478 U.S. 714 (1986)) make clear, the courts may appropriately resolve legal issues as to which the political Branches disagree in the course of determining "the rights of individuals," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992). The fact that such suits are justiciable *despite* the existence of inter-Branch conflict does not mean, however, that an inter-Branch disagreement is itself a sufficient basis for the exercise of jurisdiction by an Article III court.

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considered (and ultimately rejected) in 1991 would have caused a shift of no more than two seats. See 94-1614 Gov't Br. 18-19 (*City of New York*).

[4] The current House of Representatives' entitlement to sue on behalf of future Houses is particular tenuous with respect to its claim under the Census Clause. The House seeks a decision of this Court that would preclude any future Congress from requiring or authorizing any census methodology other than a headcount, even if Congress affirmatively concludes that the use of statistical sampling is appropriate. Whatever the merits of the House's constitutional theory, the long-term interests of the House are unlikely to be served by such a decision.

At bottom, a majority of the Members of the House simply disapprove of the way in which the Secretary of Commerce intends to execute an existing law (the Census Act). It is to the President, however, not to the Congress (or to the courts acting at Congress's behest), that the Constitution assigns the power to "take Care that the Laws be faithfully executed." Art. II, § 2, Cl. 3; see *Lujan*, 504 U.S. at 577. Congress's disagreement with the Secretary's decision, "no less than Congress' original choice to delegate to the [Secretary] the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage [of a bill] followed by presentment to the President." *Chadha*, 462 U.S. at 954-955.

B. Any Census Methodology Will Produce An Estimate Of The "Respective Numbers" Of "The Several States"

A recurring theme in the House of Representatives' brief is the assertion that the decennial census has traditionally involved an effort to "count" the numbers of people within the various States, and that the Census Bureau plans to depart from that tradition in the year 2000 by "estimating" those numbers instead. See House Br. 11, 31, 33, 44, 45, 47, 50. As we explain in our opening brief (at 47-49 & n.29), the Census Bureau has repeatedly used techniques that cannot plausibly be regarded as a "headcount" of identified individuals. But even if those techniques were abandoned, the population figures transmitted to Congress pursuant to 2 U.S.C. 2a(a) would be estimates of the actual numbers of persons in each State. The choice facing the Census Bureau and this Court concerns the appropriate method of estimating the population, not whether to estimate at all.[5]

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[5] The Secretary of Commerce is required to "take a decennial census of population as of the first day of April of [the census] year." 13 U.S.C. 141(a). Persons identified during the census, however, are not automatically allocated to the State in which they are physically present on the census date. Rather, persons have historically been allocated among the

The purpose of the decennial census is to determine the number of persons actually residing within each State in order to effectuate the constitutional directive that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers." U.S. Const. Art. I, § 2, Cl. 3. It is universally recognized, however, that the actual populations of the States cannot be determined with absolute precision. The census methodology advocated by the House of Representatives—*i.e.*, ascertaining the numbers of persons within each State who can be specifically located and identified–-will produce only an approximation of the numbers of persons actually residing within the States, not an exact count thereof.[6] The question before the Court is whether the Census Act or the Constitution requires the Bureau to employ that particular

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States based on their "usual residence" as of that date. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 803-806 (1992). The term "usual residence" connotes "more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.* at 804. In applying the concept of "usual residence," the Census Bureau has historically employed rules of general applicability rather than undertaking an individualized inquiry into the subjective loyalties or expectations of each person within the relevant categories. Thus, a high school student attending boarding school is allocated to the State in which his parents reside. See *id.* at 806. The same rule applied to college students until 1950, when the Bureau adopted its current practice of allocating those students to the States where they attend college. See *id.* at 805-806; 91-1502 J.A. 178, 219 (*Franklin*). For most of the country's history, overseas federal employees were not allocated to any State; but for the 1990 census each such person was allocated to the "home of record" identified in his personnel file. *Franklin*, 505 U.S. at 792-795. Thus, even with respect to individuals who are specifically identified on census forms, an element of generalization or estimation is built into the process by which individuals are allocated to particular States.

[6] As the Census Bureau's *Report to Congress* explains, "Census takers have never been able to contact and count each and every resident of this nation. As a result, information on less than the whole population has always been used to characterize the whole population." J.A. 81.

method of approximating the actual population—not whether the Act or the Constitution prohibits estimation as such.[7]

C. 13 U.S.C. 141(a) Grants The Secretary Broad Discretion And Specifically Authorizes The Use Of Sampling

The House of Representatives suggests that the Secretary's claim of authority to use sampling for apportionment purposes is anomalous—contrary to the spirit or overall structure of the Act—and that any ambiguity in 13 U.S.C. 195 should therefore be resolved so as to preclude the use of sampling. See, *e.g.*, House Br. 32-33. The Census Act provision that deals specifically with the decennial census of population, however, authorizes the Secretary to take that census "in such form and content as he may determine, including the use of sampling procedures." 13 U.S.C. 141(a). Section 141(a) establishes as the operative background rule that the Census Bureau may employ whatever means it believes will increase the accuracy of the state-level population counts used in the apportionment process.

The Secretary's express authority to use "sampling procedures" is thus simply one aspect of his power to conduct the decennial census "in such form and content as he may determine"—language by which "Congress has delegated its broad authority over the census to the Secretary." *City of New York*, 517 U.S. at 19. Congress's decision to confer that broad authority does not preclude the possibility that other

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[7] In common usage, a person who is instructed to "count" the number of persons or objects at a particular location, and who is specifically told that an "estimate" is not sufficient, would likely conclude that the instruction reflected a desire for a precisely accurate number. That distinction loses its significance, however, in situations (like the decennial census of population) where precise accuracy is unattainable. The House's use of the terms is particularly unusual because the Census Bureau's plan for the 2000 census is grounded in the determination that population figures derived through the use of sampling—figures that the House disparages as mere "estimates"—will *more accurately* reflect the actual populations of the States than will figures produced without sampling.

Census Act provisions bar the use of sampling for apportionment, even where the Secretary has reasonably concluded that sampling will improve the accuracy of the state-level population counts. Contrary to the House's suggestion, however, such a prohibition would be a unique exception to Congress's general approach to the decennial census.

D. 13 U.S.C. 195 Has Never Functioned As A Prohibition On The Use Of Sampling For Apportionment Purposes

As the House of Representatives recognizes (Br. 34-35), the Census Act imposed significant barriers to the use of statistical sampling prior to the enactment of Section 195 in 1957. First, the Commerce Department and Congress understood the statutory term "census" to contain an implicit requirement of a "complete enumeration" rather than a "sample survey." See *Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 Before the House Comm. on Post Office and Civil Service,* 85th Cong., 1st Sess. 7-8 (1957); H.R. Rep. No. 1043, 85th Cong., 1st Sess. 10 (1957); Comm. Dep't Br. 33-35. Second, former 13 U.S.C. 25(c) (Supp. IV 1952) required each Census Bureau enumerator to "visit personally each dwelling house in his subdivision." The effect of Section 195's opening proviso was that those pre-existing barriers remained in place with respect to the apportionment of Representatives among the States. But Section 195 was not itself a prohibition on the use of sampling for apportionment purposes. Rather, Section 195 is *and has always been* irrelevant by its terms to the apportionment process. See Comm. Dep't Br. 33-39.[8]

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[8] The legislative history of the 1957 Census Act amendments suggests that Congress at that time did not foresee the use of sampling as a technique to supplement rather than to replace efforts to contact all residents directly. See Br. for Intervenors Gephardt, et al. 8-9, 33-35. That form of sampling might well have been permissible, even for purposes of apportionment, at the time Section 195 was originally enacted.

Focusing on the 1976 amendment to Section 195, the House of Representatives contends that Congress would not have eliminated the earlier sampling prohibition "casually" or "inadvertently" (Br. 33) or in "an oblique fashion" (Br. 37). But when the original statutory barriers to sampling have been accurately identified, the House's point is demonstrably without force. Congress eliminated those barriers to sampling in the most direct and unambiguous way possible. It repealed former Section 25(c) in 1964. See Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737. And insofar as the word "census" was thought implicitly to have barred or limited the use of sampling for apportionment purposes, any such implication was eliminated by the 1976 amendment to 13 U.S.C. 141(a), which specifically authorized the Secretary to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures." See Comm. Dep't Br. 37-39.[9]

The House contends (Br. 36 n.49) that no plausible "intermediate position" exists, or has ever existed, because Section 195 itself draws no distinction between sampling used to supplement traditional enumerative techniques and sampling used in their stead. As we explain above and in our opening brief, however, the statutory barriers to sampling that existed immediately after the enactment of Section 195 were imposed by the then-current understanding of the word "census" and by former Section 25(c), not by Section 195 itself. It is by no means clear that those pre-existing statutory barriers would have precluded the use of statistical sampling as a supplement to good-faith efforts by the Census Bureau to contact all residents directly. See Comm. Dep't Br. 36-37 n.19.

The Bureau's plan for the 2000 census includes an exhaustive effort to mail questionnaires to all of the country's known households; to make questionnaires available in public places; and to encourage public participation by advertising and other outreach methods. See J.A. 73-80; 98-564 J.A. 102-104. Contrary to the House's contention (Br. 36 n.49), the sampling contemplated for the 2000 census will therefore supplement, rather than substitute for, a good-faith effort to contact all residents directly.

[9] The Census Bureau made extensive use of sampling during the 1970 census. See Comm. Dep't Br. 49 n.29; J.A. 82. Congress passed the

The House's brief is almost entirely unresponsive to the foregoing analysis. The House asserts (Br. 35-36) that Section 195 as originally enacted "unequivocally * * * prohibited the Secretary from using sampling to determine the population for purposes of apportionment." The sole authorities it offers for that proposition, however, are two committee reports, each of which states only that Section 195 *did not authorize* the use of sampling in connection with the apportionment process. See House Br. 36 n.47; Comm. Dep't Br. 34-35. The fact that Section 195 provided no affirmative authorization for sampling in the apportionment process does not suggest that Section 195 itself prohibited such uses of sampling. Nor is there any merit to the House's assertion (Br. 36) that "[i]rrespective of whether the proviso in § 195 was a 'freestanding' prohibition when it was enacted, it clearly was a freestanding prohibition after Congress eliminated § 25(c) in 1964 to permit the Bureau to take the census by mail." If our reading of Section 195 in its original form is correct–-*i.e.*, if the original purpose and effect of Section 195's opening proviso was to render that Section irrelevant to apportionment, leaving the use of sampling for apportionment purposes to be governed by other, pre-existing Census Act provisions–-the subsequent repeal of Section 25(c) could not plausibly be thought to transform the proviso into a prohibition.[10]

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express authorization of sampling in Section 141(a) in the wake of that experience, see Br. for Intevenor California Legislature 16-20, and that change was one of a number designed "to conform more properly to the current language and practices used by the Bureau of the Census," S. Rep. No. 1256, 94th Cong., 2d Sess. 1 (1976). See *id.* at 4 ("New language is added at the end of [Section 141(a)] to encourage the use of sampling and surveys in the taking of the decennial census.").

[10] As the House correctly points out (Br. 24-27), the Census Bureau and the Department of Justice have previously expressed views regarding the interpretation of Section 195 that are not consistent with our position in this case. In 1980, the Census Bureau asserted that Section 195

precluded statistical adjustment of population figures to be used in the apportionment process, and the Department of Justice defended that position in litigation, unsuccessfully. Subsequent Department of Justice opinions have concluded that Section 195 does not prohibit the use of sampling as a supplement to traditional enumerative techniques, but have suggested that Section 195 does prohibit the Bureau from using sampling for apportionment purposes as a substitute for good-faith efforts to contact all residents directly. Our position throughout the current litigation has been that Section 195 has no prohibitory effect whatever: its opening proviso renders that Section altogether irrelevant to apportionment, leaving the propriety of sampling in that context to be governed by other provisions of law.

It can hardly be contended, however, that the Census Bureau's current understanding of the applicable law represents the abandonment of a previously settled legal position. The Bureau made extensive use of sampling techniques during the 1970 census. See note 9, *supra*. And although the Secretary of Commerce ultimately decided not to employ a statistical adjustment of the 1990 census figures, he made clear that his decision did not rest on a determination that either the Census Act or the Constitution precluded an adjustment. See Comm. Dep't Br. 4-5 n.2. Indeed, the Director of the Census Bureau recommended in favor of the proposed adjustment. See 94-1614 J.A. 68-94 (*City of New York*).

Because the statutory analysis set forth in our briefs in this case is concededly a departure from prior Commerce and Justice Department positions, we have not invoked the principle that the Secretary's interpretation of the Census Act is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Section 141(a) does, however, expressly (and broadly) confer on the Secretary the authority to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures." And the *Report to Congress* and the Census 2000 Operational Plan, which are by statute the subject of this lawsuit (see Comm. Dep't Br. 9), obviously represent the Secretary's formal position that the sampling he contemplates is lawful. Moreover, insofar as the propriety of the Bureau's plan for the 2000 census depends on subsidiary technical and policy questions–-*e.g.*, whether sampling is likely to enhance the accuracy of the population counts, or whether sampling renders the census more or less susceptible to political manipulation–-the agency's views on those issues warrant deference from this Court. See *City of New York*, 517 U.S. at 23.

E. Congress Did Not Prohibit Sampling In Order To Prevent "Political Manipulation"

The Census Bureau's decision to employ statistical sampling in the 2000 census was principally based on its determination–-supported by a wealth of scientific evidence–-that the use of sampling will enable the Bureau to determine more accurately the actual populations of the United States and its political subdivisions. See Comm. Dep't Br. 5-8; 98-564 Gov't Reply Br. 1-9. The House of Representatives does not challenge the Bureau's conclusion that sampling will improve the accuracy of those population counts. Rather, the House contends that sampling will increase the danger of "political manipulation" (Br. 33, 48); and it suggests that in enacting 13 U.S.C. 195, Congress chose to prohibit the use of sampling in connection with apportionment in order to eliminate the risk of such manipulation (Br. 33). Those arguments do not withstand scrutiny.

1. As the *Report to Congress* explains, "[e]very effort has been made to ensure the independence and integrity of the decisions by the professional statisticians at the Census Bureau" in connection with the 2000 census. J.A. 128; see J.A. 128-132. After review of and comment on its plan for the 2000 census by the public and the professional statistical community, "the Census Bureau will announce and 'lock in' its final set of formulas–-well in advance of the collection of any data in 2000." J.A. 132. By making all significant methodological decisions before census data are collected, the Bureau will avoid replication of the choice that confronted Secretary Mosbacher in July 1991, when he was required to determine whether census figures would be statistically adjusted at a time when the effects of an adjustment on individual States and localities were precisely known. See *2000 Census: Progress Made on Design, but*

Risks Remain, GAO/GGD-97-142, at 60, 76 (July 1997).[11] The House's argument also incorrectly assumes that non-sampling methods present no opportunity for manipulation of the census process. In fact, a census conducted without sampling requires a host of discretionary decisions concerning appropriate methodology and allocation of resources that could significantly affect the final counts.[12]

2. The House identifies nothing in the legislative history of Section 195–-either at the time of its original enactment in 1957, or at the time of its amendment in 1976–-suggesting congressional concern that the use of sampling in the apportionment process would facilitate political manipulation.

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[11] There is no merit to the House's criticism of the Bureau (see House Br. 3) for its plan to conduct a "one number" census rather than to produce alternative sets of population figures derived with and without the use of sampling. See *Counting People in the Information Age*, at 21 (D. Steffey and N. Bradburn eds., 1994) (National Academy of Sciences (NAS) Panel to Evaluate Alternative Census Methods explains that "[t]he one-number approach * * * represents a departure from the methodology of the 1990 census," in which the ultimate decision against statistical adjustment "proved to be controversial because it occurred in a highly politicized environment in which interested parties perceived themselves as winners or losers, depending on which set of numbers was chosen."). That panel has accordingly "expressed strong approval of the one-number census concept." *Id*. at 22.

[12] Dr. Charles L. Schultze was the chairman of the Panel on Census Requirements in the Year 2000 and Beyond, a panel convened by the NAS pursuant to the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. 141 note). Dr. Schultze has testified that one advantage of the Bureau's approach is that "[t]he transparency of census operations to the Congress and the public will be improved." *Census 2000: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 1st Sess. 55 (1997). Dr. Schultze explained that "with sampling, the specific sample design is chosen before the census begins, reviewed by outside experts, and made publicly available. In the final push, the efforts of district managers and enumerators will be guided by the predetermined sample specifications and will, therefore, be much less subject to arbitrary decisions by census officials." *Id*. at 56.

Moreover, two features of the Census Act substantially undermine that notion.

a. The Act directs the Secretary to "take a decennial census of population * * * in such form and content as he may determine, including the use of sampling procedures." 13 U.S.C. 141(a). The House contends that Section 141(a)'s authorization to use sampling is subject to limitations imposed by Section 195. Whatever the merits of that contention, however, Section 141(a) confers very broad–-essentially plenary–-discretion upon the Secretary with respect to the conduct of the decennial census. See *City of New York*, 517 U.S. at 19. That provision reflects Congress's confidence that the Census Bureau will discharge its duties in a professional and non-partisan manner. Congress would not likely have deemed the Bureau to be deserving of such confidence in all other respects, yet susceptible to political manipulation with respect to sampling alone.

b. Whatever the meaning of Section 195's opening proviso, the rest of Section 195 unambiguously directs the Secretary to utilize sampling for purposes other than the apportionment of Representatives among the States "if he considers it feasible." Those additional uses of census information include intrastate redistricting and the distribution of federal funds among States and localities–-two highly politicized and contentious subjects. It strains credulity to suggest that Congress forbade the use of sampling in connection with apportionment out of concern that the census would be politically manipulated, while encouraging the Secretary to employ sampling in deriving the population figures that will be used for those other purposes.

F. The Census Bureau's Plan Is Consistent With The Constitutional Requirement Of An "Actual Enumeration"

1. The House of Representatives contends (Br. 45) that "[a]t the time of the Constitutional Convention, 'actual Enumeration' had a plain meaning" that excluded the statis-

tical methodologies described in the Census Bureau's plan for the 2000 census. That assertion is not accurate. As we explain in our opening brief (at 40), the word "enumeration" has long been understood to mean (*inter alia*) "[t]he action of ascertaining the number of something; *esp.* the taking a census of population; a census." 3 *The Oxford English Dictionary (OED)* 227 (1933). The manner in which the Bureau intends to conduct the 2000 census fits comfortably within that definition. Although the word "enumeration" *can* be used in the manner the House suggests, see *ibid.* (giving as second definition "[t]he action of specifying seriatim, as in a list or catalogue"), the House's reliance on the word's purported "plain meaning" is insupportable.[13]

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[13] The Act of Congress providing for the first decennial census used the word "enumeration" in ways that plainly did not refer to "reckoning up singly" or any other method of conducting a census. As we explain in our opening brief (at 46 n.27), the opening sentence of that Act essentially equated "enumeration" with "caus[ing] the numbers of the inhabitants to be taken." Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101. The Act also required each marshal to take an oath pledging that "I will well and truly cause to be made, a just and perfect enumeration and description of all persons resident within my district, *and return the same to the President of the United States*." *Ibid.* (emphasis added). The requirement that the marshal "return" to the President the "enumeration and description" of the people within his district in itself suggests that "enumeration" was used there to refer to the final product of the census–-*i.e.*, the population totals themselves—as distinct from the process by which those totals were derived. That understanding is confirmed by Section 3 of the Act, which provided for the Marshals to transmit to the President only "the *aggregate* amount of each description of persons within their respective districts." 1 Stat. 102 (emphasis added). Finally, Section 1 of the 1790 Act stated that "[t]he enumeration shall commence on the first Monday in August next, and shall close within nine calendar months thereafter," 1 Stat. 101–-language suggesting that the word was used there to denote the conduct of the census, although not any particular methodology. Contrary to the House's assertion (Br. 34), the 1790 Act did *not* state that census takers were "to make an 'enumeration' of every person within their districts."

The requirement of an "actual Enumeration" should also be construed in a manner that renders it consistent with the text and purpose of the Census Clause as a whole. The directive that an "Enumeration" be conducted follows, and was intended to effectuate, the fundamental requirement that Representatives be apportioned among the States "according to their respective Numbers." The rule proposed by the House, however, would compel the use of a particular methodology even if Congress believes it to be incapable of producing acceptably accurate population figures. Such a limitation would frustrate congressional efforts to ensure compliance with the independent constitutional requirement that the apportionment of Representatives must be based on the "respective Numbers" of "the several States." Basic interpretive principles counsel against that ossified and self-defeating reading of the Census Clause. "[I]t is," after all, "*a constitution* we are expounding." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

2. As we explain in our opening brief (at 41-46), the drafting history of the Census Clause strongly indicates that the phrase "actual Enumeration" was not intended to constrain Congress's choice of an appropriate methodology for determining the number of persons within each of the States. The phrase "actual Enumeration" was first employed by the Committee of Style and Arrangement. That committee revised an earlier draft provision, prepared by the Committee of Detail and approved by the Convention, stating that the "number" of each State's inhabitants "shall * * * be taken in such manner as [Congress] shall direct." 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 183, 565, 566, 571 (1966 ed.). Because the Committee of Style was not authorized to make substantive changes in the draft Constitution submitted for its review and revision, see

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The Act nowhere used the word "enumeration" to describe a process of identifying and making a notation of "every person," one at a time.

Nixon v. *United States*, 506 U.S. 224, 231 (1993), the phrase "actual Enumeration" should not be construed to limit Congress's choice of an appropriate census methodology.

Contrary to the House's suggestion (see Br. 48 n.67), we do not contend that the final text of the Constitution should be ignored or subordinated to the earlier draft prepared by the Committee of Detail. We do believe, however, that the Census Clause should be read, if fairly possible, in a manner consistent with *both* the final text and the earlier draft. Compare *Nixon*, 506 U.S. at 231 (the Court "must presume that the Committee [of Style] did its job"). The Commerce Department's interpretation of the constitutional text satisfies that standard; the House's construction does not.

3. The House also contends that the Framers were familiar with "estimation techniques" (Br. 47) and deliberately chose language that would preclude the use of such mechanisms. Statistical sampling as a probability method did not exist at the time the Constitution was drafted, however, see, *e.g.*, J.A. 343, and the Framers therefore could not have rejected its use. The estimation techniques described in the materials cited in the House's brief (at 47 n.65) did not involve efforts to ascertain the population through actual inquiry of the people. They instead involved attempts to utilize *pre-existing* data from various sources that had initially been compiled for other purposes.

Although the Constitution's "actual Enumeration" requirement does not preclude reliance on pre-existing records, it is not surprising that early Congresses eschewed their use. Federal administration of the census was deemed essential in light of the Framers' expectation that "[t]he States will be too much interested to take an impartial one for themselves." 1 Farrand at 580 (Edmund Randolph). Because the types of administrative records (*e.g.*, polling lists and militia rolls) on which colonial authorities relied would have been prepared and maintained by state officials even after the adoption of the Constitution, their use as a

basis for apportionment would have been inconsistent with the constitutional scheme. The Bureau's plan for the 2000 census is subject to no comparable criticism.

4. The House contends (Br. 48) that the Framers mandated a particular *method* of ascertaining the population "to reduce the scope of potential disputes and minimize the opportunity for political manipulation." That suggestion is without basis.

The Framers repeatedly expressed concern that Members of Congress might seek to perpetuate themselves in power by declining to reapportion the House of Representatives in light of population shifts. See Comm. Dep't Br. 46-47 n.28. The Framers explicitly addressed that danger by requiring that a new enumeration be conducted at least once within every ten-year period. U.S. Const. Art. I, § 2, Cl. 3. Neither the text nor the history of the Census Clause, however, reveals a comparable intention to circumscribe Congress's selection of *methods* of taking the census in order to prevent the use of a method that might improperly deny newly-populous States their fair share of representation.[14] To the

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[14] We are aware of only one instance in which a delegate to the Constitutional Convention appears to have alluded to the possibility that Congress might seek to maintain itself in power by conducting the census in an improper manner. Gouverneur Morris opposed any constitutional requirement that a census be conducted at specified intervals on the ground that such a requirement would "fetter[] the Legislature too much." 1 Farrand at 571. He stated that "[i]f the mode was to be fixed for taking a census, it might certainly be extremely inconvenient; *if unfixt the Legislature may use such a mode as will defeat the object: and perpetuate the inequality*." *Ibid.* (emphasis added). Morris was thus using the possibility of legislative malfeasance in the conduct of the census not as a justification for limits on Congress's authority over census methodology, but as an argument for leaving Congress free to decide the timing as well as the mode of the census. Morris's preference in that regard was based in turn on his desire to accomplish precisely what the decennial census requirement ultimately forbade–-*i.e.*, Morris sought to maintain the northeastern States in power and to prevent the western States from

contrary, the Constitution gives Congress sweeping authority to conduct the decennial census "in such Manner as they shall by Law direct." *Ibid.*; see *City of New York*, 517 U.S. at 19 ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,' and * * * there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides.").

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For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the district court should be reversed.

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gaining control of the Congress even if future migration gave the western States a majority of the country's population. See *id.* at 583 (Morris states that "[i]f the Western people get the power into their hands they will ruin the Atlantic interests.").

Edmund Randolph responded to Morris's argument by stating that "[i]f the danger suggested by Mr. Govr. Morris be real, of advantage being taken of the Legislature in pressing moments, it was an additional reason, for tying their hands in such a manner that they could not sacrifice their trust to momentary considerations." 1 Farrand at 580. In arguing that Congress's hands should be tied, however, Randolph did not suggest the adoption of constitutional constraints on Congress's freedom to conduct the census in the manner it saw fit. Rather, Randolph supported Hugh Williamson's proposal (a slight reformulation of Randolph's own earlier resolution) to require simply that "a census shall be taken" at specified intervals. *Id.* at 579. Randolph thus implicitly rejected Morris's suggestion (which was in any event offered for tactical purposes only) that a constitutional requirement addressed to the timing of future censuses would furnish illusory protection if unaccompanied by constraints on Congress's freedom to direct the manner of the census. The Convention also rejected that suggestion, since it repeatedly approved language that would require a census to be taken at specified intervals while leaving the manner of taking the census to the discretion of Congress.

Respectfully submitted.

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